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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 577

FRANCES D. PEARMAN, Petitioner,

vs:

ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare of the United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

CLAY S. CROUSE
Heaberlin Building
Beckley, West Virginia
Attorney for Petitioner.

MARVIN R. WATSON
Grier Building
Greenwood, South Carolina

IN THE

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FRANCES D. PEARMAN, Petitioner,

vs:

ANTHONY J. CELEBREZZE, Secretary of Health, Education and Welfare of the United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-styled cause on August 30, 1962.

OPINIONS BELOW

Hearing Examiner's decision, July 21, 1961; order entered by the District Court of the United States for the Western District of South Carolina on February 6,

1962, and opinion of Circuit Court of Appeals entered August 30, 1962, all of which are hereto appended.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on the 30th day of August, 1962. Petition for rehearing, seasonably filed by petitioner, was denied on October 4, 1962, by order of Mr. Justice Clement F. Haynsworth, Jr. A stay of thirty days within which to file petition for certiorari was granted on October 11, 1962. Jurisdiction of this Court is invoked under the Administrative Procedure Act, 5 U.S.C.A. 1009(e) and 42 U.S.C.A. Sec. 405(g) of the Social Security Act. On August 13, 1962, Anthony J. Celebrezze was substituted for Abraham A. Ribicoff, as defendant.

QUESTIONS PRESENTED

1) Whether the Circuit Court applied correct principles of law in determining and so holding that the petitioner, after having spent over Nine Thousand Dollars ($9,000.00) for hospital services, was required to make an effort to obtain employment after she had been advised by one of her attending physicians not to work, and the undisputed evidence that she was totally and permanently disabled from following any type of gainful employment.

2) Whether the Circuit Court applied correct principles of law in holding and so determining that the petitioner's failure to consult Rehabilitation Officers and attempt to obtain from other sources any help or advice as to what she might be able to do, was a condition precedent to entitlement to social security insurance disability benefits under 216(i) of the Act, as amended.

3) Whether upon a review of the whole record, it appears that the petitioner's physical impairments prevented her from following substantial gainful employment continuously from the date of her injury May 22, 1952, to the date of her application for disability insurance benefits on October 25, 1960, and whether those physical impairments medically determined to be of long-continued and indefinite duration.

STATUTES INVOLVED

The Administrative Procedure Act 5 U.S.C.A. 1009(e), which requires a reviewing court to set aside administrative action unsupported by substantial evidence, and in making such determination, to review the whole record; Social Security Act, Section 216(i), as amended, 42 U.S.C.A. 416(i), which defines disability as inability to engage in any substantial gainful activity by reason of any medically determinable impairment, physical or mental, which can be expected to result in death, or to be of long-continued and indefinite duration; Section 405(g) which provides for review of administrative action by a civil action brought in the District Court in the jurisdiction in which the plaintiff resides, and Section 423(c)(2), which redefines disability and requires the plaintiff to furnish such proof of the existance thereof as may be required.

STATEMENT

The basis of petitioner's claim is physical impairments resulting from a personal injury sustained in May, 1952. At that time she was thirty-two years old. For ten years before her last employment, she worked in shirt manufacturing plants, teaching various operations to new employees, filling in wherever needed, and

doing a variety of jobs, including checking shipments and orders. Her last three years of work were spent in cutting samples and forwarding them to New York for use by salesmen. All of her jobs were inside plants; all required her to be on her feet continuously. She usually worked eight hours a day six days a week with some over time at various seasons. She is a graduate of a four year high school.

On December 31, 1957, she stated to the District Manager of the Social Security Administration, at Greenwood, South Carolina, that "her job at Riegal Textile is still available but she has not been able to return to it since the accident." She was hospitalized for the injury a period of over three months; was in a cast for five months, and wore a brace "from her waist down for one year." Her right arm was in a cast for ten months. She was hospitalized again for surgery and skin grafts. She used a wheel chair for several months and crutches until 1957.

At the hearing 4/18/61, the Examiner observed that the petitioner was unable to get her right hand to her head or face, could not close her fingers, or her right hand. Her arm was stiff, and she could not flex or extend her knee. Her sitting position was with her foot straight out in front of her, and the muscles of her arm had lost their elasticity due to cast immobilization. She could not do house work requiring lifting of heavy objects, and she walked with a limp.

1-13-58, Frank H. Stelling, M. D. made a report to the defendant on its prescribed form. He first saw the claimant August 11, 1952, and once monthly thereafter to 9-6-55. He reported fracture of right femur, injury to the right knee joint, limited motion of knee from 120

degrees to 170 degrees on the right, very poor hand due to injury, a very stiff elbow, and open reduction and bone graft right forearm. He advised the petitioner not to work as of the date of his report 11-13-58.

1-15-58, Jack C. Scurry, M. D. reported severe compound comminuted fracture of right elbow and right femur; a completely ankylosed right elbow with the joint fused at approximately fifteen degrees; no motion in the elbow joint, neither flexion or extension on pronation; complete ankylosis of the right knee joint, with no motion in either direction. He stated that petitioner "was totally disabled to carry out a gainful occupation."

10-31-60, Dr. Scurry again reported severe compound comminuted fracture of the right elbow, and the petitioner unable to work because of resulting disability. Examination on 10-28-60, shows completely ankylosed right elbow, ankylosis of right knee, and inability to make a fist with right hand, and that "because of these physical findings, it is my opinion that this patient is totally and permanently disabled for work."

11-1-60, R. S. Clarke, Jr., M. D. reported that the petitioner's chief difficulty is stiffness and immobility of right elbow; stiffness of fingers of the right hand and right knee; deformity of right fifth finger; good flexion of right wrist; extension moderately impaired; forearm cannot be rotated apparently due to synosteosis between radius and ulna; right forearm fixed in 35 degrees flexion at the elbow; cannot close the right hand in making a fist, and right knee fixed in extension with barely perceptible motion remaining.

11-4-60, Frank H. Stelling, M. D. reported leg lengths, left 32½, right 32; adherent scar over medial aspect of

right knee; patella moves very slightly, is bound; large scars over the lower leg, the longest being 12" to 14" long on the anterolateral thigh, slightly adherent junction middle and distal third of this scar to the underlying quadriceps. She walks with a stiff knee gait, sits with a stiff knee, and has some difficulty clearing the right foot through because of tightness in the knee. The elbow is flexed at an agle of about 135 degrees with no motion at all in flexion and extension. Forearm is flexed in about neutral position between pronation and supination. Her hand slightly deviated to the radial side. There is a prominent ulnar styloid. Wrist extension is to neutral, flexion about 45 degrees; can oppose the thumb to the index finger, but not quite to the little finger. Fingers can be flexed to within two fingers breadth of the palm. There is tightness in the entire extensor apparatus, but she can extend her fingers well. There is extensive scarring throughout the right elbow region with radial and ulnar linear scars, but there is a very adherent scar over posterior elbow.

Evidence of petitioner at the hearing was that she walked with a limp; was unable to stand over thirty minutes to an hour; right lower extremity goes to sleep within an hour, unless elevated. Her work was limited to light work around the house. Hired help was employed to do the heavy work and mopping. She had tried attending a baby, but could not "lay it down after it goes to sleep." She could not change its clothes or pin on a diaper because of her right hand. She could not keep her balance when walking, and had fallen several times injuring herself. She did not know of any occupation or work that she could do with a reasonable amount of certainty without injuring herself. Because

of these impairments she required hired help to do her house work.

Upon inquiry by the Hearing Examiner as to whether or not the petitioner had tried to get some other job, or trained for another job by consulting the Vocational Rehabilitation Department of the State of South Carolina, the claimant stated that she "could not use a pencil, could not use scissors, and figured there was no use, and no point in it." She could hold a pencil, but could not use it any length of time on account of her fingers cramping, and could not write with her left hand, and has not been able to think of any kind of work she could do to earn money.

The petitioner's husband's evidence was substantially the same as that of the petitioner. He added that he helped her around the house because her unbalance made it dangerous for her to work; that she had fallen three times necessitating medical care. He gave as a reason for her falling she "knocks her stiff leg on almost everything that sticks up." He had fear of her falling and getting hurt. He changed jobs in order to care for her, and he did not know of any type of work she could do with any reasonable degree of safety.

SPECIFICATIONS OF ERROR TO BE URGED

The United States Circuit Court of Appeals for the Fourth Circuit erred:

1) The Court exceeded its jurisdiction under the Administrative Procedure Act, and the reviewing provisions of the Social Security Act by considering and so holding that:

(a) Offer of employment by a former employer who did not know the extent of the petitioner's phys-

ical impairments "certainly held enough hope to require investigation on her part," and

(b) "It is significant that she did not consult Rehabilitation Officers, and did not attempt to obtain, from any source any help or advice as to what she might be able to do." There is not a scintilla of evidence in the record to show that the pursuit of either course would have accomplished any useful purpose.

2) In failing to hold, as a matter of law, that the claimant had sustained her burden of proof as required under 42 U.S.C.A., Sec. 416(i) (1) (A) and Sec. 423(c) (2).

3) In its failure to hold that the Hearing Examiner's decision, affirmed by the District Court, that the claimant's impairments were not of sufficient severity "to prevent her from engaging in some type of substantial gainful work," without indicating the type of work that the claimant could do that was (a) substantial and (b) gainful.

4) And by not holding that the Administrative decision was based on speculation and conjecture.

5) That on the basis of the following evidence, without regard to the limitations, hazards, dangers, and injuries to the petitioner and others in so doing, and after having been advised by her attending physician not to work, that the mere fact that:

"THIS CLAIMANT IS ABLE TO GET AROUND, DRIVE AN AUTOMOBILE, AND WRITE WITH THE AID OF A LARGE PEN, AND CAN SIGN HER NAME WITH AN ORDINARY PEN. UNDER THESE CIRCUMSTANCES, HER MERE STATEMENT THAT SHE HAS BEEN UN-

ABLE TO THINK OF ANYTHING THAT SHE THOUGHT SHE COULD DO IS NOT VERY PERSUASIVE IN THE FACE OF THE RECORD DISCLOSURE THAT SHE HAS MADE NO EFFORT TO OBTAIN EMPLOYMENT."

Without taking into account the undisputed evidence of the limitations, dangers and hazards to the petitioner's "getting about" and the physical impairments medically determined by examining and treating physicians, and their expert opinions, that this petitioner was totally disabled from doing gainful work; that she had not shown that she was unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration," under 42 U.S.C.A. sec. 416(i)(1)(A) and sec. 423(c)(2).

REASONS FOR GRANTING THE WRIT

1) The interpretation of the Court below of the statutory requirement of the petitioner's burden of proof involves judicial legislation.

2) The decision of the Court below has decided a federal question which is clearly in conflict with applicable decisions of this Court, and all other United States Courts on two questions, (1) substantiality of evidence and (2) the burden of proof required under the disability provisions of the Social Security Act.

3) The questions presented are important in the administration of the disability provisions of the Social Security Act, and should be settled by this Court for the reason, that if the questions, as judicially determined by the Circuit Court, are permitted to stand, this and

other administrative agencies will hereafter be free to render decisions contrary to judicial and juristic reasoning, common knowledge, and human experience.

4) The petitioner and her counsel were taken by surprise by the decision of the Circuit Court, by its holding that the petitioner was required to consult a former employer and Rehabilitation Officers to sustain her burden of proof, as held by the Circuit Court, because those requisites were not considered by the Administrative Agency or the District Court as conditions precedent to sustain her burden of proof.

5) Requisites of consulting former employers and Rehabilitation Officers to sustain a claimant's burden of proof for social security insurance disability benefits, as held by the Circuit Court, are not required under 42 U.S.C.A. Section 416(i) (1) (A), and Section 423(c) (2) of the Act, expressly or by implication.

6) The questions presented are of such imperative public importance as to justify deviation from normal appellant process, and require immediate settlement in this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

FRANCES D. PEARMAN
Petitioner
CLAY S. CROUSE
Counsel for Petitioner

MARVIN R. WATSON
of Counsel

Per Curiam Opinion
Filed August 30, 1962.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8630.

Frances D. Pearman,
Appellant,

versus

Abraham A. Ribicoff, Secretary of the Department of Health, Education and Welfare,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, AT GREENWOOD. J. ROBERT MARTIN, JR., DISTRICT JUDGE.

(Argued June 6, 1962. Decided August 30, 1962.)

Before HAYNSWORTH and BELL, Circuit Judges, and CRAVEN, District Judge.

Clay S. Crouse and Marvin R. Watson for Appellant, and John C. Eldridge, Attorney, Department of Justice, (William H. Orrick, Jr., Assistant Attorney General; John C. Williams, United States Attorney, and Alan S. Rosenthal, Attorney, Department of Justice, on brief) for Appellee.

PER CURIAM:

This is Frances D. Pearman's appeal from the action of the District Court upholding the denial by the Secretary of Health, Education and Welfare of a claim for disability benefits under 42 U.S.C.A. sec. 416(i) and sec. 423.

To be entitled to disability payments, the claimant must show that she is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration . . ." 42 U.S.C.A. sec. 416(i) (1) (A) and sec. 423(c) (2).

The evidence tends to show that claimant, as a result of an automobile collision, has a completely ankylosed right elbow with the joint fused at approximately a fifteen degree angle, and also a completely ankylosed right knee joint; there is no motion whatsoever in any direction in either of these joints. In addition to these impairments, she is unable to completely close the fingers of her right hand. Two of the doctors expressed the opinion that by reason of these impairments, claimant was unable to work in any gainful activity. Beyond question, these conditions are medically determinable impairments, but that determination does not necessarily entitle claimant to the benefits of the Act. In addition to a medically determinable impairment, it must appear that the impairment causes inability to engage in any substantial gainful activity. *Underwood* v. *Ribicoff*, 298 F. 2d 850 (C.A. 4).

The evidence tends to show that this claimant is a woman of considerable intelligence and of good personality; that she has more than ordinary ability and is equipped with a high school education, and was thought

by her previous employer to be a valuable employee. Except for the medical impairments noted above, she is apparently in good health and emotionally well-adjusted to her disabilities. Although her last employment was that of cutting samples in a shirt factory, she had previously taught various operations to new employees and had performed a variety of other jobs. After the automobile collision which caused her impairments, her former employer indicated a willingness to reemploy her. Although it does not appear that he knew in detail the extent of her physical impairments, we think the fact of the offer of reemployment certainly held enough hope to require investigation on her part, if, as she sought to prove, she would have gone to work if she had been able to do so. It is significant that she did not consult the rehabilitation officers and did not attempt to obtain from any source any help or advice as to what she might be able to do.

This claimant is able to get around, drive an automobile, and write with the aid of a large pen, and can sign her name with an ordinary pen. Under these circumstances, her mere statement that she has been unable to think of anything she thought she could do is not very persuasive in the face of the record disclosure that she has made no effort to obtain employment.

The Hearing Examiner concluded that claimant had failed to establish her inability to engage in any substantial gainful activity and denied her application for benefits under the Act.

We are of the opinion that there is substantial evidence to support his findings and that the District Court properly affirmed the Secretary's decision.

Affirmed.

CERTIFIED COPY
FILED
February 7, 1961
MILLER C. FOSTER, JR., *Clerk*

IN THE

DISTRICT COURT of the UNITED STATES

FOR THE WESTERN DISTRICT
OF SOUTH CAROLINA

GREENWOOD DIVISION

Frances D. Pearman, Plaintiff,	)	
vs.	)	Civil Action No. 3025
Abraham Ribicoff, Secretary of Health, Education and Welfare, Defendant.	)	ORDER

This is an appeal from a final decision by the Secretary that Claimant is not entitled to a period of disability or to disability benefits under 42 U.S.C.A., 216(i) and 223 respectively. The question presented is whether or not the Secretary's decision is supported by substantial evidence.

The Secretary found "* * * Claimant's orthopedic impairments have not been of sufficient severity, either singly or in combination, to prevent her from engaging in some type of substantial gainful work, * * *." Claimant has limited partial use of her right arm, hand, leg and foot. She has a high school education and was

thirty-two years old at the time she became partially disabled in an automobile accident in 1952.

I find that there is substantial evidence to support the Secretary's decision that Claimant was not disabled within the meaning of the Act up to the time she filed her application.

For the above reason the decision of the Secretary is

Affirmed.

/s/ J. Robt. Martin, Jr.
United States District Judge

Charleston, S. C.
February 6, 1962

TRUE COPY
TEST:
Miller C. Foster, Jr., *Clerk*

By: Edith W. Thomas
Deputy Clerk

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

HEARING EXAMINER'S DECISION

In the case of	Claim for
Frances D. Pearman (Name of claimant)	Period of Disability and
Frances D. Pearman (Name of wage earner)	Disability Insurance Benefits
250-14-8504 (Social Security Account number)	

This case comes before the hearing examiner on a request for hearing filed on February 28, 1961 by the claimant, Frances D. Pearman, who has expressed dissatisfaction with a determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, of which she was notified on January 12, 1961, denying her application filed on October 25, 1960 for a period of disability and/or disability insurance benefits. Upon reconsideration, the Bureau's determination was affirmed and claimant was so notified by letter dated February 22, 1961. Hearing was held on April 18, 1961 at Greenwood, South Carolina, at which the claimant appeared and testified. She was represented by Attorney Marvin R. Watson, Greenwood, South Carolina.

The general issue before the examiner in this case is whether the claimant is entitled to disability insurance

benefits and the establishment of a period of disability. The more specific issue is whether, since May 22, 1952, or beginning at a time when she met the special earnings requirements of the Act for disability purposes, and continuing to the date of filing her disability application, claimant has been unable to engage in any substantial gainful activity, by reason of a medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.[1][2]

[1] Form AC-540A
[2] Form AC-541A

Form AC-514
(8-59)

The claimant, Frances D. Pearman, filed application on October 25, 1960 for a period of disability and/or disability insurance benefits, alleging that she was born on October 30, 1920; that she completed the eleventh grade in school, and that she became unable to work beginning May 22, 1952 because of a stiff right leg and right arm resulting from an accident.

Claimant's wage record shows earnings in most of the quarters ending with the second quarter of 1952, with no earnings posted thereafter. From this evidence, the examiner finds that claimant met the special earnings requirements of the statute for disability purposes in the quarter of alleged onset of disability, the second quarter of 1952, and continued to meet them through the calendar quarter ending June 30, 1957.

There is in evidence before the examiner a certification of claimant's birth certificate issued at birth, showing that she was born on October 30, 1920, and that she was

the daughter of Marvin Dunlap and Fannie Belle Dodson. From this evidence, the examiner finds that claimant was born on October 30, 1920, as alleged in her disability application.

There is before the examiner a report of an interview between the claimant and the District Manager of the Greenwood, South Carolina office of the Bureau on December 31, 1957 in connection with a previous disability application filed on that date by the claimant, which was denied by the Bureau and from which determination claimant did not take an appeal. This report of contact can be summarized as follows: Claimant completed a regular four year high school course, is highly intelligent, and has an attractive personality. She was involved in an automobile accident in May 1952 in which she suffered a severe head injury and her right arm and leg were crushed. She was unconscious for six weeks after the accident, and was in the hospital for a little over three months immediately following her injury. She was in a cast for five months and wore a brace from her waist down for a year. Her right arm was in a cast for about ten months. She was in the hospital later for four or five weeks for operations for skin grafts. Her last job was with the Riegel Textile Company, where she cut samples and forwarded them to the sales room in New York for use by the salesmen. For about ten years prior to her last job she worked in shirt manufacturing plants, teaching various operations to new employees. She filled in wherever needed, and did a variety of jobs including checking shipments to see that all orders were properly filled and on time. All her jobs were inside the plants and required her to be on her feet constantly. She has not worked since her accident in 1952, and indicated that

she was not too concerned about not having a job, as her husband had a very good job with the Riegel Textile Company. Following her accident in May 1952, she was in a wheel chair for several months, and then walked on crutches until about the first of 1957, after which she used a cane for a while when walking. At that time she discontinued going to a doctor, as she felt that her condition was "just about static." She stated that she cannot stoop or squat at all, that her right arm is stiff at the elbow, is unable to get her right hand to her head or face, and cannot close the fingers of her right hand. Her right knee is stiff and she cannot bend it, and sits with her foot straight out in front of her. Her right elbow is stiff at about a 90 degree angle, but there is mobility in her shoulder. Her doctors told her that the muscles of her right arm have lost their elasticity due to the long time she was in a cast. She does all of her own housekeeping except the heavy cleaning, but can do no housework which requires lifting of heavy objects. The Bureau representative observed that claimant walked with a limp and that her right leg appeared to be slightly shorter than the other and that she sat with her right foot extended. Claimant said that, other than her stiff joints, she had no disability.

There is also in evidence before the examiner a report of contact between the claimant and a representative of the Greenwood, South Carolina District Office of the Bureau on November 29, 1960 in connection with the subsequent application filed on October 25, 1960 which is before the examiner for consideration in this case. She stated that she had recently been in the hospital for a female operation which, so far as she knew, was entirely successful. The Bureau representative observed that

claimant was unable to close the fingers on her right hand sufficiently to grip anything, and that she walked rather stiff legged and with a limp.

The medical evidence before the examiner in this case consists of two reports from Dr. Frank H. Stelling, Greenville, South Carolina, dated January 13, 1958 and November 4, 1960; two reports from Dr. Jack C. Scurry, Greenwood, South Carolina, dated January 15, 1958 and October 31, 1960; and a report from Dr. Robert S. Clarke, Jr., Due West, South Carolina, dated November 1, 1960.

In his first report, Dr. Stelling reported that he first saw the claimant on August 11, 1952. She had had a fracture of the right femur and an injury to the right knee joint, and had limited motion of the knee from 120 degrees to 170 degrees on the right. She had a very poor hand due to injury, and a very stiff elbow.

In his subsequent report dated November 4, 1960 Dr. Stelling reported that claimant's right leg was one-half inch shorter than the left, there was a scar over the medial aspect of the right knee, and the patella moved very slightly. There were large scars over the lower right leg, which had an extension to 180 degrees and flexion to 175 degrees. She walked with a stiff knee gait and sat with a stiff knee. Shoulder motion was good in the right upper extremity, but the elbow was fixed at an angle of about 135 degrees, with no motion at all in flexion and extension. She had a fixed forearm in about neutral position between pronation and supination. The hand was slightly deviated to the radial side. She had wrist extension to neutral and flexion to about 45 degrees. She had good adduction and extension of the thumb, with a little loss of full spread. She could close the thumb to the index finger but not quite to the little

finger. The fingers of the right hand could be flexed to within about two fingers breadth of the palm, but she could extend her fingers well. There was rather extensive scarring throughout the right elbow region, with radial and ulnar linear scars, and a very adherent scar over the posterior elbow.

Dr. Jack C. Scurry of the Scurry Clinic, Greenwood, South Carolina, reported on January 15, 1958 that claimant was in an automobile accident in May 1952, in which she suffered a severe compound comminuted fracture of the right elbow and right femur which required hospitalization over a period of approximately one year. She is now doing well, has no complaints, but has a completely ankylosed right elbow, fixed at an angle of about 135 degrees. There is no motion whatever in the elbow joint, either flexion extension or pronation. There is also complete ankylosis of the right knee joint, so that there is no motion in this joint in any direction.

On October 31, 1960, Dr. Scurry filed another report with the Bureau in which he stated that the claimant was in an automobile accident in 1952, at which time she had a severe compound comminuted fracture of the right femur which extended into the right knee, and a severe compound comminuted fracture of the right elbow. She has a completely ankylosed right elbow and right knee and is unable to make a fist with the right hand.

Dr. Robert S. Clarke, Jr., reported on November 1, 1960 that claimant was injured in a highway accident on May 22, 1952 and was taken to Self Memorial Hospital, Greenwood, South Carolina, in an unconscious state, remaining so for six weeks. She sustained head injuries, fracture of the right forearm and the loss of approxi-

mately four inches of bone from the mid portion of the right femur. Both skin and bone transplants were required. Her initial hospitalization was for 100 days and she was subsequently hospitalized on two more occasions. In December 1952, her casts were removed and a leg brace fitted. Prior to the injury, her health was excellent. She had worked for fifteen years at Riegel Textile Company, Ware Shoals, South Carolina. Her chief difficulty at the present time is stiffness and immobility of the right elbow, stiffness of fingers of the right hand, and stiffness of the right knee.

Dr. Clarke further reported that claimant is a well developed and nourished female, cooperative and intelligent, with numerous scars on her right arm and right leg. Neurological examination showed no gross motor or sensory deficit and no abnormal reflexes elicited. There was deformity of the terminal phalanx of the right fingers. Flexion was good at the right wrist, but extension was moderately impaired. The forearm could not be rotated, apparently due to synostosis between the radius and ulna. The right forearm was fixed at 135 degrees flexion at the elbow. She could not completely close the right hand in making a fist. The right knee was fixed in extension with barely perceptible motion remaining.

Dr. Clarke further stated that claimant has a fixation of the right knee and elbow due to remote trauma, synostosis (bony fusion) of the right radius and ulna, and fibromyoma of the uterus or ovarian cyst. It is noted by the examiner, however, that the fibromyoma or ovarian cyst reported by Dr. Clarke was subsequently removed by an operation.

At the hearing before the examiner in this case claimant testified that she is forty years of age, has been

married for twenty-four years, and lives with her husband, who is now a carpenter. They have no children, and own their own home free of encumbrance. Her husband makes about $50 a week on the average. She does her own housework except for the heavy work, which is done by a maid who comes in periodically for that purpose. Before World War II claimant worked for seven or eight years in shirt manufacturing plants, and during the war she worked for Swift and Company in Fort Worth, Texas. After the war she came back to work for the Reigel Textile Company, Ware Shoals, South Carolina, in the rayon mill, where her job was to cut samples to send to the New York sales office and also to the company's laboratory for inspection and tests. She is right handed and did this work with her right hand. She was in good health until she had an automobile accident on May 22, 1952, caused by a pulpwood company truck backing into a car driven by her husband, resulting in her husband's car turning over and injuring her severely on the right side. Her elbow was "knocked off," and a piece of bone "knocked out" in her right leg. She also sustained head injuries, and was unconscious for about six weeks after the accident. In August 1952 an operation was performed by Dr. Stelling, Greenville, South Carolina, who is a bone specialist at the Shriners Hospital for Crippled Children. He performed several bone operations on her, which required transplanting of bone and marrow from other parts of her body to her injured right arm and right leg. Her whole body was put in a cast, which was taken off in December 1952 and replaced by a brace on her leg. She could not walk at all until April 1953, and was in a wheel chair and on crutches and a cane until the summer of 1953. Her medical and hospital bills were between $9000 and

$10,000, but she collected damages of $55,000 from the company that was responsible for her accident. At the present time she walks with a slight limp, and her right leg is stiff, with no motion at the knee. Her right elbow was "knocked off" in the accident, and has become stiff, so that she cannot extend it. All of her injuries were on the right side of her body, and her left leg and arm are all right. She did not lose the patella on her right leg, but the muscles "drew up" because of the long time that her leg was in a cast after the operation, so that she cannot bend it. She testified that, although she had injuries to her head caused by the automobile accident, there was no brain injury. Her family doctor at the time of the accident was Dr. Buck Pressly, who is now deceased. Her present family doctors are Dr. Jack Scurry and Dr. Robert S. Clarke, Jr., the latter of whom is her "every day doctor." Claimant further testified that she cannot bend the fingers of her right hand very well, and can not use a pencil or scissors with that hand. She has tried to train herself to be left-handed, but has been unable to do so. The rayon plant of the Riegel Company where she was employed at the time of her accident went out of business after the accident, and she has not attempted to get another job, because she does not know of any kind of work she can do, on account of her stiff right leg and right arm. It was observed by the examiner that claimant testified with her right leg fully extended, indicating obvious inability to flex the knee of that leg.

Claimant's husband, Ben Pearman, testified before the examiner that, at the time of the accident, he was working at the Riegel Textile Company, but later changed his employment so that he could be nearer home, and is now working as a carpenter. He testified that his wife has a hard time keeping her balance, because of her stiff right

leg, and has fallen two or three times on her right arm. He did not think that she was able to do any gainful work.

When Congress enacted the 1954 Amendments to the Social Security Act providing for the establishment of a period of disability, as defined in Section 216(i) of the Act, and the 1956 Amendments providing for disability insurance benefits, as defined in Section 223 of the Act, it was made clear by reports of Congressional committees that a claimant would not be entitled to a finding of disability unless the impairment was expected to result in death or to be of long-continued and indefinite duration, and was of such severity as to preclude the claimant from engaging in any substantial gainful activity in the foreseeable future. Congress clearly placed the burden upon a claimant to submit substantial evidence to support each and every element of his claim.[3] [4]

It must be established by medical evidence, and when necessary, by appropriate medical tests, that a claimant's impairments have resulted in such a lack of ability to perform significant functions, such as moving about, handling objects, hearing or speaking, or, in the case of mental impairment, reasoning and understanding, that he cannot, with his training, education, and work experience, engage in any kind of substantial gainful activity.

To be entitled to disability insurance benefits and the establishment of a period of disability, therefore, the claimant in the instant case must show that, beginning May 22, 1952, or at some time prior to June 30, 1957, when she last met the earnings requirements, and continuing to the date of filing her disability application on October 25, 1960, she has been unable to engage in

[3] Form AC-542
[4] Form AC-543

any substantial gainful work, not merely the work in which she was engaged prior to the onset of her alleged disability.

The medical evidence before the examiner in this case establishes without question that claimant's only impairments are orthopedic impairments, consisting of a stiff right leg and stiff right arm, which are the residuals of an automobile accident on May 22, 1952. The evidence further establishes that claimant sustained severe injuries in that accident, including a compound comminuted fracture of the right femur extending into the right knee, and also a severe compound comminuted fracture of the right elbow, requiring skin and bone transplants and prolonged hospitalizations. She has a bony fusion of the radius and ulna of the right arm and a completely ankylosed right elbow, with the joint fused at approximately a 135 degree angle. There is also complete ankylosis of the right knee joint, and the right leg is one-half inch shorter than the left. The right leg can be flexed only to 175 degrees, and for practical purposes there is no motion in this joint in any direction. It was observed by the examiner at the hearing that claimant walked with a limp and a stiff knee gait, and also sat with her right leg stretched out in front of her and practically straight. Although claimant is unable to make a complete fist with her right hand, she can extend her fingers well and has good adduction and abduction of the thumb. Other than her orthopedic impairments claimant has no impairments whatever, and is in excellent health. She has a high school education, and has had considerable experience in various operations in textile and shirt manufacturing plants, including experience in instructing new employees.

It is worthy of note in this connection that claimant has made no attempt to secure other employment, and that she is not under any particular economic compulsion to do so, in view of the fact that she obtained a substantial financial settlement of $55,000 in connection with her automobile accident, that her husband is steadily emloyed, that they have no dependents, and own their home free and clear of encumbrance.

After a careful consideration of the evidence of record, the examiner is compelled to find that claimant's orthopedic impairments have not been of sufficient severity, either singly or in combination, to prevent her from engaging in some type of substantial gainful work, and do not constitute a "disability," within the meaning and intent of the applicable provisions of the Social Security Act, as amended.

It is, therefore, the decision of the hearing examiner that the claimant, Frances D. Pearman, is not entitled to disability insurance benefits or the establishment of a period of disability under her application filed on October 25, 1960.

MERLE P. LYON,
Hearing Examiner

Date: July 21, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 577

FRANCES D. PEARMAN, PETITIONER

v.

ANTHONY J. CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition in this case raises the single question whether there was substantial evidence in the administrative record to support the determination of the Secretary of Health, Education and Welfare that petitioner was not under a disability within the meaning of Sections 216(i)(1) and 223(c) of the Social Security Act, as amended, 42 U.S.C. 416(i) and 423 (c), and therefore was not eligible for disability benefits under the Act. On the basis of their examination of the record, both courts below concluded that the administrative finding was amply supported. This conclusion is clearly warranted and there is

no question of general importance calling for further review by this Court.

Section 216(i)(1), which deals with the establishment of a period of disability, defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." Section 223(c), which determines entitlement to disability insurance benefit payments, contains a like definition. Both sections place the burden of proof upon the claimant.[1]

In this case, petitioner established that, at the time of the filing of her applications for benefits,[2] she had

[1] For those who qualify under its provisions, Section 216 of the Act (42 U.S.C. 416) provides a period when neither the time elapsed nor the age record of the disabled applicant will be taken into account in determining insured status at the age of 65 under 42 U.S.C. 414, or in computing the amount of benefits payable under 42 U.S.C. 415. Similarly, for those who qualify, Section 223 (42 U.S.C. 423) provides for disability insurance benefits. An applicant, like petitioner here, must prove "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. 416(i)(1) and 423(c)(2).

[2] Petitioner filed her first application in 1957, seeking only a period of disability under Section 216(i) of the Act, 42 U.S.C. 416(i) (Tr. 60–63). This was denied and petitioner did not seek a hearing (Tr. 70). About two and a half years later, on October 25, 1960, petitioner filed a second application with the Bureau, seeking both a period of disability under Section 216(i) of the Act and disability insurance benefits under Section 223, 42 U.S.C. 416(i) and 423 (Tr. 71–74).

"Tr." references are to the administrative transcript, which is part of the record before this Court.

certain impairments resulting from an automobile accident in 1952: immobility or ankylosis of the right knee, ankylosis of the right elbow; and an inability to make a complete fist with her right hand (Pet. App. 14).[3] Impairments of this nature do not, however, invariably cause inability to engage in substantial gainful employment; they may or may not, depending upon all of the individual circumstances.

The administrative determination was necessarily based upon an evaluation of all of the evidence bearing upon petitioner's impairments and capabilities. This evidence showed that, by her own admission, petitioner has been able to engage in a not inconsiderable degree of activity, notwithstanding her stiff knee and elbow and impaired hand. She is able to get around without help, to do most of her housework and to drive an automobile equipped with automatic transmission (Tr. 34–38, 61, 64–65). She has learned to do many things with her left hand and can write with her right hand when using a pen (Tr. 56–57, 64).

The evidence further disclosed that petitioner's age, education and work experience were also fully consistent with the performance of light work. Petitioner was thirty-seven years old at the time of the filing of her first application (Tr. 60). She is a high school graduate and is reported to be very intelligent

[3] "Pet. App." references are to the petition for a writ of certiorari.

and personable (Tr. 62, 65). Her work experience is varied and she has the apparent ability to learn new jobs (Tr. 38–42, 64–65). Her own description of her last position—working with samples in a rayon plant—indicated that she was not merely performing simple manual duties but was called upon to assume a significant degree of responsibility (Tr. 41–42).

The South Carolina State Agency of Vocational Rehabilitation, to whom petitioner's 1960 application was referred under Section 221 of the Act, 42 U.S.C. 421, for a recommendation on the question of disability, concluded that petitioner's abilities are such that she ought to be able to return to the same type of work (Tr. 87–89). Her employer wrote to her, following her accident in 1952, stating that the company desired her to return (Tr. 42). Nevertheless, since the accident, petitioner has not sought to obtain work or to ascertain what she might be able to do (Tr. 36, 43, 52). As the Court of Appeals pointed out, this consideration was properly taken into account by the Secretary (Pet. App. 15). See, also, *Adams* v. *Flemming*, 276 F. 2d 901, 904 (C.A. 2); *Grindstaff* v. *Flemming*, 188 F. Supp. 44 (W.D. N.C.); *Sampson* v. *Flemming*, 189 F. Supp. 725 (D. Kan.); *Warcheim* v. *Ribicoff*, 194 F. Supp. 533 (D. Md.); *Druminski* v. *Ribicoff*, 194 F. Supp. 798 (D. Alaska); *Brady* v. *Ribicoff*, 195 F. Supp. 35 (D. Md.).

In sum, on the administrative record as a whole, the Secretary was fully justified in concluding that petitioner's impairments did not preclude her from engaging in any substantial gainful employment. We accordingly believe that there is no occasion for

further review, see *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490–491. The petition should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
JOHN C. ELDRIDGE,
Attorneys.

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No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1962

FRANCES D. PEARMAN, PETITIONER

v.

ANTHONY J. CELEBREZZE, SECRETARY OF HEALTH EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL STATEMENT AND REPLY MEMORANDUM OF PETITIONER

CLAY S. CROUSE
Heaberlin Building
Beckley, West Virginia

MARVIN R. WATSON
Grier Building
Greenwood, South Carolina
Attorneys for Petitioner

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL STATEMENT AND REPLY MEMORANDUM OF PETITIONER

PETITIONER'S EXPERIENCE, TRAINING AND WORK SKILLS:

REPORT OF CONTACT, 12/31/57, EXHIBIT 2, TR. 64:

"2. *Daily Activities*—Wage earner cannot stoop or squat at all. Her right arm is stiff at the elbow, and she is unable to get her hand to her head or face. She was right-handed; is trying to use her left hand as she cannot close her fingers on her right hand.

"She does most of the cooking for herself and her husband. She also does housework except heavy cleaning. She can do no hard work or ironing or other jobs which require lifting of heavy objects.

"3. *Work Experience*—For about ten years prior to her last job she worked in shirt manufacturing plants teaching various operations to new employees. She said she would fill in wherever needed and did a variety of jobs including checking shipments to see that all orders were properly filled and on time.

"The last three years she worked for Riegel Textile, she cut samples and forwarded them to the sales room in New York for use by the salesmen.

"All of her jobs were inside the plants. All required her to be on her feet constantly. She usually worked eight hours a day six days a week with some overtime at various seasons. She said she received a Christmas bonus following her accident in May, but no services were performed after the accident."

REPORT OF CONTACT, 11/29/60, EXHIBIT 9, TR. 78:

"We would also like to call attention to the fact at the present time, due to arthritic condition in her hands, she is not able to close the fingers on her right hand sufficiently to grip anything. We also noticed as she left the interview desk she walks rather stiff-legged and now limps somewhat."

EVIDENCE OF PETITIONER'S IMPAIRMENTS: TR. 36:

"Q. What type of work did you do prior to the accident?

"A. I cut samples for Reigel Textile put-up.

"Q. Have you been able to do any of that kind of work since the accident?

"A. No.

"Q. You have visited the Vocational Rehabilitation several times; is that true; over in my building, where they tried to get you a job?

"A. No.

"Q. Can you keep your balance when you walk? Do you have trouble?

"A. If I stumble I can't catch myself. I have fallen several times, and would mess up this bad arm. I don't have an elbow, and I don't have skin enough to fix back again.

"Q. You do have trouble keeping your balance?

"A. I stumble.

"Q. If there was an impairment in the street, you would have trouble?

"A. Yes, I can't catch myself.

"Q. Do you know of any occupation or work you could do with a reasonable amount of certainty that you would not injure yourself?

"A. No. I don't know what it would be.

"Q. Isn't it true that even some of the small things you do make you fall?

"A. That's the reason I have to have a colored woman to do the heavy work.

"Q. You have actually fallen some doing that type work?

"A. Yes, in the yard, I have fallen several times.

"Q. I believe you can drive a car for a short distance?

"A. If it is power operated.

"Q. You have just driven for a short distance?

"A. Yes. My leg tired. I have never tried to drive any distance.

"Q. Have you driven in crowded traffic conditions?

"A. I have driven to Greenwood and back, and to Honea Path and back, places like that.

TR. 52–53:

"Q. The medical evidence seems to agree, as far as all the doctors whose reports have been submitted here, and I don't think there is any doubt about the impairments you have. The only question before me is whether or not those impairments are of sufficient severity to prevent any gainful work. Have you consulted the Vocational Rehabilitation Department of the State of South Carolina, to try to get some other job or get training for another job?

"A. No. I can't use a pencil, can't use scissors, and I figure there was no use, no point in it.

"Q. You have a pretty good general education, you are a high school graduate. I was wondering if you had ever considered doing clerical work, or whether you could do some clerical work.

"A. I can't use a pencil any length of time. My fingers cramp. I can hold a pencil, but can't use it.

"Q. Have you tried to teach yourself to use your left hand?

"A. No. I have tried it different times; I have tried it, but I can't write lefthanded.

"Q. You don't think there is any kind of work you could do to earn money?

"A. I haven't been able to think of anything I could do at all.

EVIDENCE OF PETITIONER'S HUSBAND:

TR. 53:

"Q. You help her a great deal around the house?

"A. Yes, it puts me through pretty well.

"Q. Isn't it dangerous for her to work because of her unbalance?

"A. Yes. She has fallen two or three times, and I had to take her to the doctor and have her arm sewed up. She can't protect herself with that arm, and and she would fall every time on her arm. The stiff leg, she knocks it on almost anything that sticks up, and it keeps me afraid about her falling and getting hurt.

"Q. That's one reason you changed jobs?

"A. Yes."

THE CLAIMANT'S ATTENDING PHYSICIAN SAW HER ONCE MONTHLY FOR OVER THREE YEARS AFTER THE INJURY. THE LAST TIME HE SAW HER 9/6/55, HE ADVISED HER NOT TO WORK. Tr. 67, Exhibit #3.

AUTHORITIES CITED BY THE DEFENDANT IN OPPOSITION TO THE GRANTING OF THE WRIT

1) Grindstaff v. Flemming, 188 Fed. Sup. 44 (W.D. N.C.). Lung condition was claimant's major impairment. Examining physicians reported pulmonary reserve had not been reduced to such a degree as to preclude substantial gainful activity. Claimant's examining physician advised the claimant not to work in dusty occupations, and that his impairment did not preclude employment in other occupations.

2) Sampson v. Flemming, 189 Fed. Sup. 725 (D. Kansas). Claimant refused two jobs which were offered him that examining physicians reported he was able to do.

3) Wareheim v. Ribicoff, 194 Fed. Sup. 533 (D. Md.). Physical impairment relied upon was a heart ailment which had been classified by examining phy-

sicians as Class II, which denotes a slight limitation of physical activity under the American Heart Association Classification.

4) Drumiski v. Ribicoff, 194 Fed. Sup. 798 (D. Alaska). The evidence was that of a single examining physician who expressed the opinion that the claimant was totally and permanently disabled. The same examining physician stated that: "He found no evidence of any heart disease", and that "there is nothing about the cardiovascular system that would prevent his working."

5) Brady v. Ribicoff, 195 Fed. Sup. 35 (D.C. Md.). The physical impairment upon which the claimant's social security disability insurance benefits was determined thirteen months after the claimant's insurance status had expired. There was no evidence that he had any disability as of the date of the expiration of his insurance coverage.

6) Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474-497. In this case, the Court construed Section 10(e) of the National Labor Relation Act, as amended by the Taft-Hartley Act (29 U.S.C.A., Sec. 160(e) and the Administrative Procedure Act 5 U.S.C.A. 1009(e), which requires a reviewing court to set aside administrative action unsupported by substantial evidence, and in making such determination, to review the whole record, and held that under those statutes, the Court should take into account whatever in the record fairly detracts from the weight of evidence, and that the Court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it without taking into account contradictory evidence, or evidence from which conflicting inferences could be drawn", and further considered that:

"Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

7) Adams v. Flemming, 276 Fed. 2d. 901. The plaintiff, a comparatively young man, was manager of the Marine Service Department and Inland Claims. His salary was $9,000.00 a year, with twenty-four employees under his supervision. His employer reluctantly arranged for his retirement upon the claimant's judgment as to his physical condition. In support of his claim, he submitted his affidavit outlining his medical history since 1946, with medical reports. The medical reports which he submitted indicated that treatment could control and eleviate his complaint, which was a sinus condition. None of the doctors stated that he was unable to engage in any gainful substantial activity. Plaintiff, himself, had every opportunity to testify as to how his sinus condition adversely affected his ability to do any work. He did not do so, but relied on documents and reports, and did not introduce any evidence along the lines mentioned in the reports.

ARGUMENT AND AUTHORITIES

It is apparent from the opinion of the Circuit Court, that the Court inserted two conditions and held that they were in effect precedent to the claimant's entitlement to social security disability insurance benefits, namely: (a) Consultation with former employer, and (b) Rehabilitation Officers and held that it was incumbent upon the petitioner to comply with those conditions to sustain her burden of proof under 42 U.S.C.A., Section 416(i) (1) (a) and Section 423 (c) (2) of the Act.

The Act is not susceptible of that construction by its expressed terms or by implication. Such a construction is contrary to all of the decisions of the Fourth Circuit. Prior to the decision in the instant case, the case of Underwood v. Ribicoff, 4th Circuit, 298 Fed. 2d 850, the same Court had followed the decisions of Circuit Courts generally and determined and so held that there are four elements of proof to be considered in making a finding:

> "There are four elements of proof to be considered in making a finding of Claimant's ability or inability to engage in any substantial gainful activity. These are: (1) the objective medical facts, which are the clinical findings of treating or examining physicians divorced from their expert judgments or opinion as to the significance of these clinical findings, (2) the diagnoses, and expert medical opinions of the treating and examining physicians on subsidiary questions of fact, (3) the subjective evidence of pain and disability testified to by Claimant, and corroborated by his wife and his neighbors, (4) Claimant's educational background, work history, and present age."

The Court commented: "Looking at what Congress has done, we do not think that it would have been willing to adopt the Secretary's suggestion if it had been advanced; at all events it has not done so. Even if the question were more doubtful than it appears to us, we should be in duty bound to give the Act a liberal construction. We would not be free to tailor the Act, even if we found the proposed restriction logically attractive."

In Ferran, 293 Fed. 2d, 568, 5th Cir., the Court commented in part: "The design (of the Act) is, by a comprehensive contributory insurance plan, to avert the personal hazards and the social problems which often, but happily not always attend old age."

Chief Judge Wyche, D.C. S.C., June 22, 1962, in Foster v. Ribicoff, 200 F. S. 99, a case similar to the instant case, reviewed principles of law and fact involved, which are substantially the same as in the instant case. His review is the following.

> Each and every claimant under the Social Security Act is entitled to have his or her case considered in the light of the individual, particular facts and circumstances surrounding such a claim. The very wording of Section 223 of the Social Security Act, 42 U.S.C.A. § 423, makes the point most strongly that each case and each person must be considered individually. That section sets forth that "every individual" who meets the requirements and is under a disability shall be entitled to a disability insurance benefit. The act is concerned not with a standard man of ordinary and customary abilities, but with the particular person who may claim its benefits and the effect of the impairment upon that person, with whatever abilities or inabilities he has. Thus, if a medically determinable physical impairment exists, the court should consider whether such impairment prevents the particular plaintiff from engaging in any substantial gainful activity for which he is qualified, and to that end may consider his education, training, and experience, as well as the nature and extent of the impairment itself.
>
> Nowhere does there appear in the act any reference to a requirement of "total disability". The official interpretation of this phrase as presented to Congress by representatives of the Department of Health, Education and Welfare, does not support the position taken by the defendant in this case. The Social Security Administration, in an effort to answer some of Senator Byrd's questions, submitted a statement setting forth their stand on the disability freeze provisions. See Page 43 of the hearings. Therein the Department acknowledged that the concept of "substantial gainful activity" is a growing one which must be treated in each instance

on the facts. The Department states on Page 43 of the hearings: "Substantial gainful activity means the performance of substantial services with reasonable regularity in some competitive employment or self-employment. It relates to the range of activities the individual can perform * * * complete helplessness is not necessary to a finding of an allowable disability. Sporadic or infrequent activity would not necessarily establish ability to engage in substantial gainful activity."

The phrases "inability to perform any substantial gainful activity" and "total disability" are not synonymous.

In the determination of this case, the controlling questions are: (1) what can plaintiff do; and (2) what employment opportunities are there for a woman who can do only what plaintiff can do? Abstract speculation by the Appeals Council as to a possibility of employment is not evidence which a claimant should have to refute; if it were, disability could never exist.

To summarize, the courts have generally agreed that the test of a claimant's disability or inability to engage in any substantial gainful activity is a subjective one, that is, what is reasonably possible in the light of the plaintiff's physical and mental capacities and his education, training, and experience. It is not necessary that the plaintiff establish the complete absence of any opportunity for substantial gainful employment; he need only establish that he has become disabled from employment in any work or vocation in which he could profitably seek employment in the light of his physical and mental capacities and his education, training, and experience. Furthermore, it is clear that a plaintiff need not be totally helpless or bedridden in order to be considered disabled under the Social Security Act. Dunn v. Folsom, D.C.Ark., 166 F.Supp. 44, 48; Adams v. Flemming, D.C.Vt., 173 F. Supp. 873; Aaron v. Fleming, D.C. Ala., 168 F.Supp. 291; Hall

v. Flemming, 6 Cir., 1961, 289 F.2d 290; Kerner v. Flemming, 2 Cir., 283 F.2d 916; Hier v. Ribicoff, D.C.Ill. 1961, 194 F.Supp. 22; Randall v. Flemming, D.C.Mich. 1961, 192 F.Supp. 111; Snelling v. Ribicoff, D.C.E.D.S.C., 198 F.Supp. 432 (1961); Corbin v. Ribicoff, D.C.W.D.S.C., 204 F. Supp. 65 (1962); Butler v. Flemming, (CA 5) 288 F.2d 591 (1961); Underwood v. Ribicoff (CA4) 298 F.2d 850 (1962); Klimaszewski v. Flemming, (D.C.E.D.Pa.1959) 176 F.Supp. 927; Ribicoff v. Hughes, 295 F.2d 833 (CA 8, 1961); Kohrs v. Flemming, 272 F.2d 731 (CA 8, 1959); Roberson v. Ribicoff, (CA 6) 299 F.2d 761 (1962); King v. Flemming, 289 F.2d 808 (CA 6, 1961); Teeter v. Flemming, 270 F.2d 871 (CA 7, 1959); Pruitt v. Flemming, 182 F.Sup.159,S.D.W. Va.; Pollak v. Ribicoff, 300 Fed. 2d, 674.

In conclusion, we desire to specifically call the Court's attention to the following facts:

1) There is no dispute in the evidence in this case.

2) This petitioner's attending physician, who had seen her every month for a period of more than three years after her injury, advised her not to work in a report to the defendant dated January 13, 1958.

3) Before the hearing in this case, her former employer, who had offered her employment after the injury and who did not know about her physical impairments, had gone out of business.

Respectfully submitted,
CLAY S. CROUSE
MARVIN R. WATSON